U.S. Department of Labor

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Issue Date: 26 January 2007

Case No.: 2005-BLA-05944

In the Matter of

B.L.,
Claimant

v.

GATLIFF COAL CO.
c/o ACORDIA EMPLOYERS SERVICE
Self-insured Employer

and

DIRECTOR OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

Appearances: MARK FORD, Esq.
For the Claimant

LOIS A. KITTS, Esq.
For the Employer/Carrier

CHRISTIAN BARBER, Esq.
For the Director, Office of Workers' Compensation Programs,
U.S. Department of Labor

Before: ADELE HIGGINS ODEGARD
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§901-945 ("the Act") and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that Title.

Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of coal miners whose death was due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a disease of the lungs resulting from coal dust inhalation.

On May 26, 2005, this case was referred to the Office of Administrative Law Judges for a formal hearing (DX 31).[1] Subsequently, in April 2006, the case was assigned to me. The hearing was held before me in Harlan, Kentucky on August 22, 2006, at which time the parties had full opportunity to present evidence and argument.

The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law.

I. ISSUES

The following issues are presented for adjudication:[2]

(1) the length of the Claimant's coal mine employment;[3]
(2) whether the Claimant suffers from pneumoconiosis;
(3) whether his pneumoconiosis, if any, arose from coal mine employment;
(4) whether the Claimant is totally disabled;
(5) whether the Claimant's total disability, if any, is due to pneumoconiosis; and
(6) whether the Claimant has established a change in a condition of entitlement pursuant to 20 C.F.R. §725.309(d).

II. PROCEDURAL BACKGROUND

The Claimant filed this claim for benefits on May 24, 2004 (DX 4). On March 4, 2005, the District Director issued a proposed Decision and Order denying benefits, based on his determination that the Claimant had established none of the elements for entitlement to benefits (DX 26). The Claimant appealed, and requested a formal hearing on March 23, 2005 (DX 27).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Factual Background

The Claimant was born in 1944. He is married, and has two adopted children under age 18 (DX 13). According to records maintained by the Social Security Administration, the Claimant was employed by various coal mine operators from 1962 to 1972, and then again from 1976 through 1978, and also in 1980 (DX 9). His earnings are listed below, rounded to the nearest dollar.

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[1] The following abbreviations are used in this Opinion: "DX" refers to Director's Exhibits; "CX" refers to Claimant's Exhibits; "EX" refers to Employer's Exhibits; "T." refers to the transcript of the August 22, 2006 hearing.

[2] The Employer withdrew its controversion of the responsible operator issue, as well as any controversion that the Claimant had three dependents (T. at 28-29).

[3] The parties stipulated that the Claimant had at least 10 years of coal mine employment (T. at 29-30). I find that the record supports this stipulation. The Claimant also submitted testimonial evidence regarding his coal mine employment.

E & J Coal Co., Fourmile, KY	
1961: $412; 1962: $431; 1963: $124; 1964: $445; 1965: $50; 1967: $426	1961: 3 Q and 4 Q[4] 1962: 1 Q and 2 Q 1963: 1 Q and 2 Q 1964: 2 Q, 3 Q, and 4 Q 1965: 3 Q 1967: 2 Q
Champion Coal Co. 3, Manchester, KY	
1962: $23	1962: 4 Q
Alva Star Coal Co., Alva, KY	
1963: $1279; 1964: $817	1963: 3 Q and 4 Q 1964: 1 Q and 2 Q
Baker Coal Corp., Brookside, KY	
1965: $396; 1966: $481	1965: 4 Q 1966: 1 Q and 2 Q
Mingo Mountain Coal Corp., Middlesboro, KY	
1966: $1964; 1967: $131	1966: 2 Q, 3 Q, and 4 Q 1967: 1 Q and 4 Q
Gatliff Coal Co., Corbin, KY	
1967: $2210; 1968: $4441; 1971: $2851 1976: $7840; 1977: $594; 1978: $10,538	1967: 3 Q and 4 Q 1968: 1 Q, 2 Q, and 3 Q 1971: 1 Q, 2 Q, and 3 Q 1976: 3 Q and 4 Q 1977: 1 Q 1978[5]
Brownies Creek Collieries, Middlesboro, KY	
1968: $1524; 1969: $6188; 1970: $5835 1971: $3007; 1972: $1632	1968: 4 Q 1969: 1 Q, 2 Q, 3 Q, and 4 Q 1970: 1 Q, 2 Q, 3 Q, and 4 Q 1971: 1 Q, 3 Q, and 4 Q 1972: 1 Q
Toms Creek Coal Co., Inc., Balkan, KY	
1971: $1005	1971: 1 Q and 3 Q

[4] The designation "Q" indicates calendar quarter. For example, "1Q" is the first quarter of the year (January-March), etc.

[5] After 1977, the Social Security Administration stopped reporting income based on calendar quarters and reported only yearly income.

Bledsoe Deep Mining Co., Philadelphia, PA	
1977: $4037	1977: 2 Q and 3 Q
Trent Coal Co., Inc., Harragate, TN	
1977: $4442	1977: 3 Q and 4 Q
T.C. Bell, Inc., Corbin, KY	
1980: $7828	1980

The Claimant's Social Security Records also listed employment with additional employers. However, it is unclear whether these employers are coal mine operators, as these employers are not listed in the Claimant's claim (DX 5).[6] Consequently, I did not consider the Claimant's employment with these operators as coal mine employment. These employers, the dates of the Claimant's employment, and the amounts the Claimant earned, rounded to the nearest dollar, are listed below:

Dixie Fuel Co., Grays Knob, KY	1971: 3 Q
1971: $1243	
Triple I Co., Inc., Springfield, KY	1977: 1 Q
1977: $320	

This is a subsequent claim. The Claimant previously submitted a claim for benefits in August 1987, which was administratively denied in January 1988. The Claimant did not appeal the denial of the prior claim (DX 2).

B. Claimant's Testimony

The Claimant testified under oath at the hearing. He stated that his coal mine employment ended in 1980, and that his last job in the mines was as a jack setter. He testified that a jack setter works with a continuous miner, at the face of the mine, lifting the jacks and putting them into position. The jacks weigh about 75 pounds, and he would move jacks 200 to 300 times per shift. He also had to shovel dust, four to six inches deep. The shift was 8 hours long, and it was constant work, except for a 30 minute meal break. He would often work overtime, and would also work every other Saturday (T. at 29-33).

The Claimant also testified that he stopped working in 1980 because of back problems, and also because he was in a car accident. Regarding his breathing, the Claimant testified that he is unable to do any outside work, such as cutting the grass. He stated that he uses oxygen part of

[6] Not all of the employers listed in the Claimant's claim correlated with employers listed in the Social Security records. Consequently, I based my findings primarily on the Social Security records, as I find that they present a reliable record of the Claimant's employment. Based on the Claimant's assertion that he worked as a miner for all coal mine operators, I presumed that any company the Claimant listed, or any company with "Coal" or "Mining" or similar term in its title, was a coal mine operator.

the day, and sleeps with oxygen on at night. He also uses a nebulizer, sometimes twice a day, as well as an inhaler, which he uses up to three or four times a day. The Claimant testified that he has been under medical treatment for his lungs for about four years, and was hospitalized the year before for breathing problems, and had been hospitalized several other times as well (T. at 33-37).

The Claimant stated that he has other medical problems in addition to his breathing, such as high blood pressure and arthritis. Even if he did not have those problems, the Claimant testified, he would not have the ability to work as a jack setter, because he would not be able to lift the 75 pounds required, due to his breathing problems (T. at 37-39).

On cross examination, the Claimant testified that he and his wife have two adopted children, ages eight and sixteen. They also have adopted two other children, but these children are grown and are no longer dependents (T. at 40-41).

In response to my questions, the Claimant clarified that he had worked at several different mines for the Employer, but could not remember the specific time he worked for the Employer. He recalled working for Mingo Mountain and for Baker Coal, and recalled that there were times that he was not working, due to layoffs. He also recalled working for Alva Star Coal, and for E & J, which was his first coal mine employer. He stated that he hand loaded coal for E & J and was paid $8 a day in cash. He also recalled that he worked for Clyde Bennett, who paid in cash, and he believed he worked for Bennett in 1971 or 1973 "or something another like that" (T. at 42-47).

The Claimant also stated, in response to my questions, that he had been on oxygen about five months, and on the breathing machines about six months. He stated that his breathing has gotten worse over the last year, and he is now unable to lift any weight. He can do work around the house in an air conditioned environment, but not outside, because the heat and humidity bother him (T. at 47-50).

C. Relevant Medical Evidence

The Claimant presented the results of an arterial blood gas test administered by Dr. Glen Baker (CX 1). In addition, after the hearing, the Claimant submitted the deposition testimony of Dr. Baker, taken shortly before the hearing, in August 2006 (CX 2).[7] In June 2004, Dr. Baker conducted the pulmonary evaluation of the Claimant under §725.406.

In its affirmative case, the Employer presented a medical report from Dr. Bruce Broudy, dated November 2004, which included a chest X-ray interpretation, pulmonary function test, and arterial blood gas test that Dr. Broudy administered to the Claimant (DX 19). The Employer also submitted a medical report from Dr. Abdul Dahhan, dated March 2006, which included a chest X-ray interpretation, pulmonary function test, and arterial blood gas test that Dr. Dahhan administered to the Claimant (EX 1). To rebut Dr. Baker's X-ray interpretation, the Employer

[7] I authorized the post-hearing submission of this Exhibit (T. at 7).

submitted an X-ray interpretation by Dr. Thomas Hayes of the same X-ray film that Dr. Baker interpreted (EX 4).[8]

After the hearing, the Employer submitted the deposition testimony of Dr. Dahhan, taken in August 2006, shortly before the hearing (EX 3).[9] Also after the hearing, the Employer submitted two addendums to Dr. Dahhan's report, dated July 2006 and September 2006 (EX 2 and 6).[10]

These items will be discussed in greater detail below.

D. Subsequent Claim

Because this claim is a subsequent claim, it must be denied unless the Claimant can demonstrate that one or more applicable conditions of entitlement have changed since the denial of the prior claim. §725.309(d). See Grundy Mining Co. v. Flynn, 353 F.3d 467 (6th Cir. 2004). I must consider the new evidence and determine whether the Claimant has proved at least one of the elements of entitlement previously decided against him. If the Claimant proves at least one element of entitlement, then I must consider whether all of the evidence establishes that he is entitled to benefits. Sharondale Corp. v. Ross, 42 F.3d 993 (6th Cir. 1994).

As §725.309(d) states, the following rules pertain to the adjudication of subsequent claims:

> (1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim;
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> (2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. . . .[I]f the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously;
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> (3) If the applicable conditions of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement . . . .

E. Length of Coal Mine Employment

In this matter, the Employer has controverted the length of the Claimant's coal mine employment, which the District Director determined to be 10 years (DX 26). The purpose of a

[8] The Employer also submitted Dr. Hayes's professional qualifications (EX 5).
[9] I authorized the post-hearing submission of this Exhibit (T. at 26).
[10] I authorized the post-hearing submission of Dr. Dahhan's September 2006 addendum (T. at 26-27).

hearing before an administrative law judge is to resolve contested issues of fact or law. See §725.455(a). Under the governing regulation, if the evidence establishes that a miner worked in or around coal mines during at least 125 working days during a calendar year or partial periods totaling one year, then the Claimant will be considered to have worked one year in coal mine employment. If a miner worked fewer than 125 days in a year, then the miner has worked a fractional year based on ratio of the actual number of days worked to 125. §725.101(a)(32)(i). If the evidence is insufficient to establish beginning and ending dates of a year's employment, then an administrative law judge may divide the miner's yearly income by the amount of the average yearly income for miners for that year reported by the Bureau of Labor Statistics. §725.101(a)(32)(iii).

I find that the Claimant's testimony establishes that all of his employment for coal mine operators, as listed above, constitutes coal mine employment. There is very little evidence of record regarding the beginning and ending dates for each year of the Claimant's coal mine employment. Based on the Bureau of Labor Statistics figures, and employing the method prescribed in §725.101(a)(32), I find that the Claimant's total coal mine employment is 10.55 years. I calculate the Claimant's coal mine employment as follows:[11]

Full years of employment for six years: 1968; 1969; 1970; 1971; 1977; 1978

Partial years of employment totaling 4.55 years of employment, calculated as follows:
1961: 0.16 1962: 0.17 1963: 0.49 1964: 0.42 1965: 0.14 1966: 0.71
1967: 0.76 1976: 0.98 1980: 0.72

No coal mine employment is credited for years before 1961, for the years 1973, 1974, 1975, and 1979, or after 1980.

I note that the Claimant testified about his coal mine employment and stated that two of his employers, E & J and Clyde Bennett, paid in cash.[12] I did not make any adjustments to my calculations based on his testimony, based on my conclusion that the Claimant's information about these employers was insufficient for me to conclude that the Social Security information was wrong or incomplete.[13]

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[11] §725.101(a)(32) requires that the Bureau of Labor Statistics table of average coal mine employment wages be included in the Claimant's record, if this method is used. The relevant table is in the record at DX 24.

[12] The Claimant's testimony that he earned $8 per day for E & J Coal does not specify whether that amount was his gross or net pay. Assuming that the Claimant earned $8 per day gross pay during his entire employment with E & J, and that his income is correctly reflected in his Social Security records, I calculate that the Claimant has at most an additional 1.17 years of coal mine employment that is not credited.

[13] The Claimant's Social Security records reflect coal mine employment for E & J in the 1960s. The Claimant's claim asserts that he worked for Clyde Bennett from 1976 to 1977; his testimony regarding the dates of his employment for Bennett is vague at best. The Claimant's Social Security records do not reflect any employment for Clyde Bennett, but reflect employment for the Employer in 1976 and 1977, as well as employment for several other operators in 1977.

F. Entitlement

Because this claim was filed after January 19, 2001, the Claimant's entitlement to benefits is evaluated under the revised regulations set forth at 20 C.F.R. Part 718. The Act provides for benefits for miners who are totally disabled due to pneumoconiosis. §718.204(a). In order to establish an entitlement to benefits under Part 718, the Claimant bears the burden to establish the following elements by a preponderance of the evidence; (1) the miner suffers from pneumoconiosis; (2) the pneumoconiosis arose out of coal mine employment; (3) the miner is totally disabled; and (4) the miner's total disability is caused by pneumoconiosis. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994).

1. Elements of Entitlement:

Pneumoconiosis Defined:

Section 718.201(a) defines pneumoconiosis as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." This definition includes both medical or "clinical" pneumoconiosis, and statutory, or "legal" pneumoconiosis, which themselves are defined in that subparagraph at (1) and (2). "Clinical" pneumoconiosis consists of diseases recognized by the medical community as pneumoconioses, characterized by permanent deposition of substantial amounts of particulates in the lungs, and the fibrotic reaction of the lung tissue, caused by dust exposure in coal mine employment. "Legal" pneumoconiosis includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. Further, §718.201(b) states: "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment."

a. Whether the Claimant has Pneumoconiosis

There are four means of establishing the existence of pneumoconiosis, set forth at §§718.202(a)(1) through (a)(4):

(1) X-ray evidence: §718.202(a)(1).
(2) Biopsy or autopsy evidence: §718.202(a)(2).
(3) Regulatory presumptions: §718.202(a)(3).[14]

Based on the Social Security records, the Claimant was credited with 0.98 years of coal mine employment for 1976, and a full year for 1977.

[14] These are as follows: (a) an irrebutable presumption of total disability due to pneumoconiosis if there is evidence of complicated pneumoconiosis (§718.304); (b) where the claim was filed before January 1, 1982, there is a rebuttable presumption of total disability due to pneumoconiosis if the miner has proven fifteen (15) years of coal mine employment and there is other evidence demonstrating the existence of totally disabling respiratory or pulmonary impairment (§718.305); or (c) a rebuttable presumption of entitlement applicable to cases where

(4) Physician opinion based upon objective medical evidence: §718.202(a)(4).

X-ray Evidence

Section 718.202(a)(1) states that a chest X-ray conducted and classified in accordance with §718.102 may form the basis for a finding of the existence of pneumoconiosis. ILO Classifications 1, 2, 3, A, B, or C shall establish the existence of pneumoconiosis; Category 0, including subcategories 0/0 and 0/1, do not establish pneumoconiosis. Category 1/0 is ILO Classification 1.

The current record contains the following chest X-ray evidence:

Date of X-Ray	Date Read	Ex.No.	Physician	Radiological Credentials[15]	Interpretation
06/25/2004	06/25/2004	DX 15	Baker	B reader	ILO: 1/0 (4 zones; mid and lower lung, both lungs)
06/25/2004	08/10/2006	EX 4	Hayes	BCR, B reader	Neg. for pneumoconiosis; "lobar and bullous EM [emphysema] both upper lobes; past inflammatory changes both lung bases"
11/30/2004	11/30/2004	DX 19	Broudy	B reader[16]	ILO: 0/1 (4 zones; mid and lower lung, both lungs)
03/09/2006	03/09/2006	EX 1	Dahhan	B reader	Neg. for pneumoconiosis; emphysema noted

It is well established that the interpretation of an X-ray by a B reader may be given additional weight by the fact-finder. Aimone v. Morrison Knudson Co., 8 B.L.R. 1-32, 34 (1985). The Benefits Review Board has also held that the interpretation of an X-ray by a physician who is a Board-certified radiologist as well as a B reader may be given more weight than that of a physician who is only a B reader. Scheckler v. Clinchfield Coal Co., 7 B.L.R. 1-128, 131 (1984). Additionally, a finder of fact is not required to accord greater weight to the

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the miner died on or before March 1, 1978 and was employed in one or more coal mines prior to June 30, 1971 (§718.306).

[15] A physician who is a Board-certified radiologist ("BCR") has received certification in radiology of diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Board of Radiology. See generally: http://www.answers.com/topic/radiology#after_ad1. A B reader is a physician who has demonstrated proficiency in assessing and classifying X-ray evidence of pneumoconiosis by successful completion of an examination conducted by the National Institute for Occupational Safety and Health (NIOSH). NIOSH is a part of the Centers for Disease Control and Prevention, in the U.S. Department of Health and Human Services. See 42 C.F.R. §37.51 for a general description of the B reader program.

[16] The Employer's prehearing statement reflects that Dr. Broudy is a B reader. His professional qualifications are not otherwise included in the record.

most recent X-ray evidence of record. Rather, the length of time between the X-ray studies and the qualifications of the interpreting physicians are factors to consider. McMath v. Director, OWCP, 12 B.L.R. 1-6 (1988); Pruitt v. Director, OWCP, 7 B.L.R. 1-544 (1984).

In the Claimant's case, the only physician who has interpreted an X-ray as showing evidence of pneumoconiosis is Dr. Baker. Dr. Baker is a B reader, but is not a Board-certified radiologist. Dr. Hayes, who is dually qualified as a Board-certified radiologist and B reader, has interpreted the same X-ray as negative for pneumoconiosis. In addition, the record contains two other X-rays, both taken after the X-ray that Dr. Baker interpreted. Both of those X-rays were interpreted by B readers, and in neither case were they interpreted as showing evidence of pneumoconiosis.

I give more weight to the opinion of Dr. Hayes than I do the opinions of the other physicians, because as a Board-certified radiologist he has more extensive experience and more specialized qualifications than do the others. I note that Dr. Hayes did not find that the Claimant's X-ray was completely negative; he concluded that the Claimant showed evidence of emphysema, as well as other abnormalities in his lower lung lobes. I also note that two subsequent X-rays did not show evidence of pneumoconiosis. Because these X-rays were not interpreted by dually qualified physicians, I give them less weight than I give the interpretation by Dr. Hayes. Nevertheless, these X-ray interpretations do tend to confirm that Dr. Hayes's interpretation is reliable.

Based on the foregoing, I find that the Claimant is unable to establish, by means of X-ray evidence, that he has pneumoconiosis.

Biopsy or Autopsy Evidence

A determination that pneumoconiosis is present may be based on a biopsy or autopsy. §718.202(a)(2). That method is not available here, as the current record contains no such evidence.

Regulatory Presumptions

A determination of the existence of pneumoconiosis may also be made using the presumptions described in §§718.304, 718.305, and 718.306. Section 718.304 requires X-ray, biopsy, or equivalent evidence of complicated pneumoconiosis, which is not present in this case. Section 718.305 is not applicable because this claim was filed after January 1, 1982. §718.305(e). Section 718.306 applies only in cases of deceased miners who died before March 1, 1978. Since none of these presumptions applies in this case, the existence of pneumoconiosis has not been established under §718.202(a)(3).

Physician Opinion

The fourth way to establish the existence of pneumoconiosis under §718.202 is set forth in subparagraph (a)(4): A determination of the existence of pneumoconiosis may also be made if a physician exercising sound medical judgment, notwithstanding a negative X-ray, finds that the

miner suffers or suffered from pneumoconiosis as defined in §718.201. Any such finding shall be based on objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion. As stated above, the definition in §718.204(a) of pneumoconiosis includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis, and so a physician opinion may be expected to discuss either "clinical" pneumoconiosis, or "legal" pneumoconiosis, or both.

A medical opinion is reasoned if the underlying documentation and data are adequate to support the findings of the physician. Fields v. Island Creek Coal Co., 10 B.L.R. 1-19 (1987). A medical opinion that is unreasoned or undocumented may be given little or no weight. Clark v. Karst-Robbins Coal Co., 12 B.L.R. 1-149 (1989). Generally, a medical opinion is well documented if it provides the clinical findings, observations, facts and other data the physician relied on to make a diagnosis. Fields, supra. An opinion based on a physical examination, symptoms, and a patient's work and social histories may be found to be adequately documented. Hoffman v. B. & G Construction Co., 8 B.L.R. 1-65 (1985).

The record contains the following medical opinions:

Dr. Glen Baker (DX 14, 15; CX 1, 2)

In June 2004, Dr. Baker conducted the pulmonary evaluation of the Claimant, in accordance with §725.406, and submitted a written report. This evaluation included a physical examination; additionally, Dr. Baker took a work and medical history and administered various medical tests, including a pulmonary function test and arterial blood gas test.

Dr. Baker recorded that the Claimant informed him that he had a history of pneumonia, attacks of wheezing, and chronic bronchitis; and that for the last 10-12 years he had produced sputum, wheezed, and coughed daily. He had a history of peptic ulcer disease, arthritis, and high blood pressure, and had a back injury. The Claimant also reported that he had dyspnea for 10-12 years, could walk 100 yards on level ground and complete less than one flight of stairs, had occasional hemoptysis with hard coughing, and had orthopnea for 10-12 years and paroxysmal nocturnal dyspnea for 3-4 years. On physical examination, no abnormalities were noted.

Dr. Baker's report, which incorporated the results of the medical tests and presumed a coal mine employment history of 20 years underground and a smoking history of 1 pipe per day for three years, reflected the following diagnoses: Coal workers' pneumoconiosis 1/0, based on abnormal chest X-ray and coal dust exposure; COPD [chronic obstructive pulmonary disease] with moderate obstructive ventilatory defect, based on pulmonary function test; moderate hypoxemia, based on arterial blood gas test; chronic bronchitis, based on history; and questionable left ventricular dysfunction, based on history. Dr. Baker attributed all of these diagnoses, except the ventricular dysfunction, to coal dust exposure. He attributed the possible ventricular dysfunction to heart disease (DX 15).

Dr. Baker also testified by deposition. In his deposition, Dr. Baker summarized his qualifications, stating that he is Board-certified in internal medicine and pulmonary disease and

is a B reader. Dr. Baker testified that the Claimant told him that his most recent employment in the mines was as a jack setter, but that he had a number of jobs over the years, and that he had about 20 years of coal mine employment in underground mines. Dr. Baker explained that the Claimant also told him that he had a family member with tuberculosis, but he himself had not had the disease. He also recounted the Claimant's reported symptoms, including the fact that the Claimant coughed up blood on occasion (hemoptysis); needed to be propped up to sleep because he couldn't breathe when sleeping on a flat surface (orthopnea); and had to get up and get fresh air when sleeping (paroxysmal nocturnal orthopnea)(CX 2 at 1-8).

Dr. Baker testified that his initial pulmonary function study of the Claimant had been invalidated, but he considered it valid and reproducible, because three of the four trials were within 5% of each other. He noted that the other trial probably was not a valid measurement of the Claimant's capabilities. However, the valid trials indicated that the Claimant was disabled, based on federal guidelines. In response to a question about the technician's comment that the flow-volume loops were suggestive of sub-optimal effort, Dr. Baker stated the tests were valid. He also stated that the Claimant's arterial blood gas test results showed mild to moderate hypoxemia; these did not meet federal guidelines for disability, but were very close, suggesting that the Claimant would be unable to perform manual labor (CX 2 at 8-12).

Dr. Baker testified that coal dust exposure could cause obstructive lung disease, and he stated that he thought the Claimant had coal workers' pneumoconiosis based on his history of coal dust exposure plus the changes noted. He also concluded that the Claimant had COPD with moderate obstructive defect based on coal dust exposure, and noted that the Claimant's reported smoking history of one pipe per day for three years probably would not cause any trouble with his breathing. He also stated that the hypoxemia and chronic bronchitis were due to coal dust. Dr. Baker testified that several journal articles and professional papers had been published which linked coal dust exposure to obstructive lung disease. He also testified about a second arterial blood gas test performed in July 2006. He stated that the results of that test were consistent with the results of the earlier test, as they showed moderate hypoxemia, but they were not qualifying for disability (CX 2 at 12-16).

On cross-examination, Dr. Baker testified that he saw the Claimant twice: once for the pulmonary evaluation and then later for the second arterial blood gas test. He did not recall how much time he spent with the Claimant. Dr. Baker mentioned several articles on obstructive lung disease, including a pamphlet issued by the National Institutes of Health, Heart and Lung division, and other articles titled "Obstructive Lung Disease and Coal Dust Exposure" and "Pulmonary Function of U.S. Coal Miners Related to Dust Exposure Estimates," as well as others, that he used in his determination of the Claimant's condition. Counsel for the Employer requested that the articles he relied upon be attached to the deposition transcript. On re-direct examination, Dr. Baker identified four articles upon which he had relied (CX 2 at 19-27).

Dr. Bruce Broudy (DX 19)

On behalf of the Employer, Dr. Broudy evaluated the Claimant in November 2004 and submitted a written report.[17] Dr. Broudy performed a physical examination, took a medical and work history, and administered various tests, including a pulmonary function test, chest X-ray, and arterial blood gas test.

In his report, Dr. Broudy wrote that the Claimant informed him that he had scarring on his chest X-rays, possibly from work in the mines. The Claimant also reported that he had breathing trouble since the 1980s, used an inhaler several times a day for relief, and had trouble sleeping because of coughing and choking at night. The Claimant also told Dr. Broudy that he had chest pain (but no cardiac abnormalities had been found), and that he had shortness of breath and dyspnea on exertion when walking 50-60 yards, and he could not walk uphill. On physical examination, Dr. Broudy noted that the Claimant's lungs had shallow excursion. Dr. Broudy also noted that, during the pulmonary function test, the Claimant "did not do a good forced vital capacity maneuver." Dr. Broudy assessed the Claimant's X-ray as showing opacities in profusion 0/1, which is negative for pneumoconiosis, but remarked that the scarring process was nonspecific and could be related to the Claimant's past history of peptic ulcer.

Dr. Broudy presumed the Claimant had a coal mine employment history of 20 years underground setting jacks and working as a roof bolter, and had no smoking history. He diagnosed the Claimant with mild to moderate obstructive airways disease, and stated that the Claimant's lung function and blood gas test results "just do exceed the minimum federal criteria for disability" in coal workers' pneumoconiosis. Dr. Broudy commented that the Claimant's disease was "probably due to chronic bronchial asthma;" noted that the Claimant had some response to bronchodilator, which is not typical of impairment due to pneumoconiosis; and stated that the Claimant had not evidenced any changes suggesting silicosis or coal workers' pneumoconiosis by X-ray.

Dr. Abdul Dahhan (EX 1, 2, 3, and 6)

At the request of the Employer, Dr. Dahhan, who is Board-certified in internal medicine and pulmonary disease and is a B reader, conducted an evaluation of the Claimant in March 2006 and submitted a written report (EX 1).[18] Dr. Dahhan performed a physical examination, took a medical and work history, and administered various tests, including a chest X-ray, pulmonary function test, and arterial blood gas test.

Dr. Dahhan's report reflects that the Claimant told him that he had a history of daily cough with productive clear sputum and frequent wheeze, and had been on oxygen for the past two months. The Claimant also stated to Dr. Dahhan that he used an inhaler as needed, got

[17] Dr. Broudy's professional qualifications are not included in the record. I note, however, that his written report is on his professional letterhead, which states that he practices in the field of "pulmonary diseases" (DX 19).

[18] Dr. Dahhan's qualifications are discussed in his deposition (at EX 3) and are not appended to his written report (at EX 1).

dyspnea on exertion and on climbing less than one flight of stairs, and that he slept on two pillows. The Claimant did not indicate that he had paroxysmal dyspnea or hypertension. The report reflects that the Claimant's physical examination was essentially normal, with no crepitation, rhonci, or wheeze, and with good breath sounds to both lungs (EX 1).

In his report, which was based on the Claimant's reported work history of 21 years underground as a jack setter and occasional pipe smoking, Dr. Dahhan concluded that the Claimant had chronic obstructive lung disease. However, Dr. Dahhan also concluded that the Claimant's condition was not related to his coal mine employment, for the following reasons: the Claimant's last exposure to coal dust was in 1988, which was so remote that any industrial bronchitis would have eased; he was being treated with bronchodilators, which indicated that his condition was amenable to treatment and was thus not irreversible; the level of the Claimant's obstructive impairment was far greater than could be anticipated from coal mine dust alone; and there was no evidence of complicated pneumoconiosis or other fibrosis that could cause significant obstructive impairment. Dr. Dahhan did not give an opinion about whether the Claimant had simple coal workers' pneumoconiosis (EX 1).

Additionally, the Employer submitted the transcript of Dr. Dahhan's deposition, taken in August 2006 (EX 3). Dr. Dahhan testified that the Claimant told him that he had 21 years of employment in underground mines, ending in 1988, and had started smoking a pipe a few months before. Dr. Dahhan stated that he interpreted the chest X-ray he administered to the Claimant as showing no evidence of pneumoconiosis, but it did show hyperinflation of the lungs. According to Dr. Dahhan's testimony, he determined that the Claimant was totally disabled from coal mine employment, and at the time of his initial evaluation he was unable to determine whether this disability was related to inhalation of coal dust. After he had reviewed medical records pertaining to the Claimant, however, he concluded that the Claimant's disability was unrelated to coal dust exposure (EX 3 at 4-8).

In his deposition, Dr. Dahhan testified that the Claimant did not have an impairment in 1987, and developed his obstructive impairment after the cessation of coal dust exposure. Additionally, the Claimant's impairment was responsive to bronchodilator, which indicated that it was not a fixed impairment but was more likely caused by hyperactive airway disease. Because legal pneumoconiosis is defined as a pulmonary impairment caused or aggravated by the inhalation of coal mine dust, Dr. Dahhan stated, the Claimant did not have legal pneumoconiosis. Dr. Dahhan pointed out that the Claimant did not have any evidence of coal workers' pneumoconiosis by radiograph either (EX 3 at 8-9). On cross examination, Dr. Dahhan clarified that he did not testify that an obstructive defect could not be related to coal mine dust exposure, but rather that he would not expect an obstructive defect to be as severe as the Claimant's, based on coal mine dust inhalation alone. Dr. Dahhan noted again that, in 1987, which was near the end of his coal mine dust exposure, the Claimant showed no evidence of any obstructive defect (EX 3 at 9-12).

The Employer also submitted two addendum reports from Dr. Dahhan, dated July 2006 (EX 2) and September 2006 (EX 6). In his July 2006 addendum, Dr. Dahhan reported on his review of various medical records pertaining to the Claimant, covering the time period between 1972 and 1987. I considered the July 2006 addendum to be a continuation of Dr. Dahhan's

initial written report under §725.414(a)(3)(i), and not a responsive report under §725.414(a)(3)(ii).[19] Based on these records, Dr. Dahhan concluded that the Claimant did not have an obstructive impairment in 1987. Dr. Dahhan also remarked that the rapid progression of the Claimant's obstructive impairment, after the termination of coal dust exposure, tended to negate the conclusion that the Claimant's condition was related to his coal mine employment (EX 2).

Dr. Dahhan's September 2006 addendum was submitted in response to Dr. Baker's deposition testimony. Consequently, it is admitted as a responsive report under §725.414(a)(3)(ii). In this addendum, Dr. Dahhan refers to several of the articles to which Dr. Baker referred in his deposition testimony, and states that these articles support the contention that the Claimant's severe obstructive pulmonary impairment could not be caused by coal mine dust (EX 6).

Discussion

Dr. Baker's diagnoses of coal workers' pneumoconiosis and an obstructive respiratory impairment, both caused by coal mine dust inhalation, indicate that Dr. Baker determined that the Claimant has both clinical and legal pneumoconiosis, as defined in §718.201. Dr. Baker's determination that the Claimant had coal workers' pneumoconiosis is based in part on his own X-ray interpretation (positive for pneumoconiosis), as well as the Claimant's reported work history of 20 years of underground coal mine employment. Dr. Baker did not articulate, either in his written report or his deposition testimony, what data may have led him to the conclusion that the Claimant has coal workers' pneumoconiosis. I note that, although the Claimant reported a multitude of symptoms to Dr. Baker, Dr. Baker did not note any abnormalities on physical examination.

Dr. Baker's deposition testimony reflects his understanding that coal dust exposure may cause obstructive respiratory impairments, and his testimony that coal dust inhalation caused the Claimant's condition reflects that tenet. However, Dr. Baker's diagnosis of a coal-dust related impairment is based on his understanding that the Claimant had 20 years of coal mine employment. The evidence indicates, and I have found, that the Claimant has approximately 10 years of such employment, only about half of what Dr. Baker presumed. Therefore, I find that Dr. Baker's opinion, which is based on incorrect data relating to the Claimant's dust exposure, is not well-reasoned, and I give it little weight.[20]

[19] To the extent that Dr. Dahhan's July 2006 addendum mentioned chest X-ray interpretations and test results exceeding the evidentiary limitations of §725.414 and §725.309, I disregarded those references. I note that, although Claimant's counsel objected to the July 2006 addendum at Dr. Dahhan's deposition, he did not renew this objection at the hearing (See CX 3 at 10; T. at 9-25).

[20] I also note that Dr. Baker did not administer a bronchodilator in the Claimant's pulmonary function test, so he was unable to draw any conclusion from the effect of bronchodilators on the Claimant's respiratory impairment.

Both Dr. Broudy and Dr. Dahhan noted that the Claimant's obstructive disorder demonstrated some improvement after bronchodilation. However, neither of these physicians addressed the etiology of the Claimant's residual impairment. Neither, for example, discussed whether the residual impairment indicated simple coal workers' pneumoconiosis or an obstructive lung impairment related to coal mine employment, or whether it indicated a condition unrelated to the Claimant's coal dust exposure. The regulation recognizes that a physician may diagnose pneumoconiosis, notwithstanding a negative X-ray. Neither Dr. Broudy nor Dr. Dahhan seems to have considered the issue of whether the Claimant had simple coal workers' pneumoconiosis. Similarly, they did not address the issue of whether that portion of the Claimant's obstructive impairment unresponsive to bronchodilation was related to his coal mine employment history. Therefore, I find that their opinions are not well-reasoned, and I give them little weight.[21]

The Claimant bears the burden of establishing that he has pneumoconiosis. All of the physicians agree that he has an obstructive respiratory impairment; an obstructive impairment which arises from coal mine employment constitutes pneumoconiosis, under the regulation. However, none of the physicians has provided a well-reasoned opinion regarding the etiology of the Claimant's obstructive impairment. Moreover, none of the physicians has provided a well-reasoned opinion regarding whether the Claimant has clinical pneumoconiosis, based on objective medical evidence and a sound understanding of the Claimant's coal mine employment history. Consequently, I must find that the Claimant is unable to establish, by physician opinion, that he suffers from pneumoconiosis, as the regulation defines it. I also find that the Claimant is unable to establish, by a preponderance of evidence, that he has pneumoconiosis, by any means set forth in §718.202. This constitutes no change from the final denial of the Claimant's previous claim, in 1988.

b. Whether the Pneumoconiosis "Arose out of" Coal Mine Employment

Under the governing regulation, a miner who was employed for at least ten years in coal mine employment is entitled to a rebuttable presumption that pneumoconiosis arose out of coal mine employment. §718.203(b). However, where a miner has established less than ten years of coal mine employment history, "it shall be determined that such pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship." §718.203(c).

In this case, I have found that the Claimant has more than ten years of coal mine employment. Therefore, he is entitled to the rebuttable presumption. However, as set forth above, I also have found that the Claimant is unable to establish that he has pneumoconiosis. Consequently, he is unable to benefit from this presumption. This represents no change since the final denial of his previous claim, in 1988.

[21] These physicians also presumed that the Claimant had at least 20 years of coal mine employment, as opposed to the 10.55 years I have found. Moreover, Dr. Dahhan's conclusion is based on his presumption that the Claimant ceased his coal mine employment in 1988; the record reflects that the Claimant stopped working in the mines in 1980.

c. Whether the Claimant is Totally Disabled

The Claimant bears the burden to establish that he is totally disabled due to a respiratory or pulmonary condition. Section 718.204(b)(1) states that a miner shall be considered totally disabled "if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner: (i) from performing his or her usual coal mine work; or (ii) from engaging in gainful employment . . . requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time." Nonpulmonary and nonrespiratory conditions, which cause an "independent disability unrelated to the miner's pulmonary or respiratory disability" shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. §718.204(a). See also Beatty v. Danri Corp., 16 B.L.R. 1-11 (1991).

The regulation provides that, in the absence of contrary probative evidence, the following may be used to establish a miner's total disability: pulmonary function tests with values below a specified threshold; arterial blood gas tests with results below a specified threshold; a finding of pneumoconiosis with evidence of cor pulmonale with right-sided congestive heart failure. §718.204(b)(2)(i)(ii) and (iii). Where the above do not demonstrate total disability, or appropriate medical tests are contraindicated, total disability may nevertheless be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in his usual coal mine employment. §718.204(b)(2)(iv).

Pulmonary Function Tests

The record contains the following pulmonary function test results (where two values are listed, the second value reflects measurements taken after a bronchodilator was administered):

Date of Test	Physician	FEV_1	FVC	MVV	FEV_1/FVC ratio	Valid ?
06/24/2004	Baker	1.92	3.97	No record	48%	No[22]
11/30/2004	Broudy	2.19/2.44	4.04/4.32	60/68	54%/56%	Yes[23]
03/09/2006	Dahhan	1.65/1.76	2.87/2.96	32/36	57%/59%	Yes

[22] The test record contains the following notation: "Dyspnea noted. Flow-volume loops suggestive of suboptimal effort." The Claimant's degree of cooperation is noted as "fair." (DX 15 at 4). The record was later reviewed by Dr. Burki at the Department of Labor, who invalidated the test, stating: "Incomplete flow/volume curves. Curve shapes indicate suboptimal effort" (DX 15 at 3). The Claimant was offered the opportunity to have a second pulmonary function test, but declined, because he had been hospitalized due to heart problems after the first test and he was concerned he might have a similar adverse reaction to a second test (DX 17).

[23] Flow-volume loops are included in the record, but some are very faint and are difficult to read (DX 19).

In order to demonstrate total respiratory disability on the basis of the pulmonary function tests, the studies must, after accounting for gender, age, and height, produce a qualifying value for the forced expiratory volume [FEV_1] test and at least one of the following: a qualifying value for the forced vital capacity [FVC] test; a qualifying value for the maximum voluntary volume [MVV] test; or a value of the FEV_1 divided by the FVC that is less than or equal to 55%. §718.204(b)(2)(i). "Qualifying values" for the FEV_1, FVC, and the MVV tests are results measured at less than or equal to the values listed in the appropriate tables of Appendix B to Part 718.

The Claimant was born in February 1944, so he was 60 years old at the time of the first two tests and 62 years old at the time of the most recent test. His height was listed variously at 70.5 inches and 179 centimeters, which is equivalent to 70.5 inches. I find, therefore, that the Claimant is 70.5 inches tall. For a male who is 70.5 inches tall, the qualifying FEV_1 values are 2.09 at age 60 and 2.06 at age 62; the qualifying FVC values are 2.66 at age 60 and 2.63 at age 62, and the qualifying MVV values are 84 at age 60 and 82 at age 62.

Based on the foregoing, the Claimant obtained qualifying values for the tests Dr. Baker administered (with a qualifying FEV_1 value and a ratio of 48%) and Dr. Dahhan administered (with qualifying FEV_1 and MVV values). The test Dr. Broudy administered did not net qualifying values.[24] The record reflects that the test Dr. Baker administered was later invalidated, based upon excessive variability between the trials, and Dr. Baker conceded that at least one of the trials was probably not valid. However, the fact that a test does not meet regulatory standards does not, of itself, require that the test results be disregarded. Appendix B to part 718 states: "If it is established that one or more standards have not been met, the claims adjudicator may consider such fact in determining the evidentiary weight to be given to the results of the ventilatory function tests."

Notably, however, the values Dr. Baker obtained do not vary widely from the values Dr. Broudy and Dr. Dahhan obtained. In fact, the test Dr. Dahhan administered shows that the Claimant had an even more severe pulmonary impairment than did the test Dr. Baker conducted.

Based on the fact that the results of the Claimant's pulmonary function tests are basically consistent, I find that the results of the test Dr. Baker administered have some degree of reliability. All of the pulmonary function tests of record establish that the Claimant had an obstructive pulmonary impairment. Dr. Dahhan administered the pulmonary function test to the Claimant in 2006, two years after the other physicians conducted their tests. These test results indicate that the Claimant's pulmonary impairment has worsened; based on these results, he can be considered totally disabled. There is no indication that the test Dr. Dahhan administered is invalid.

Based on the foregoing, I find that the Claimant has established, by means of pulmonary function test results, that he is totally disabled.

[24] I note, however, that the values showed a significant obstructive impairment, both before and after bronchodilators were administered.

Arterial Blood Gas Tests

A Claimant may also establish total disability based upon arterial blood gas tests. In order to establish total disability, the test must produce a qualifying value, as set out in Appendix C to Part 718. §718.204(b)(2)(ii). Appendix C lists values for percentage of carbon dioxide [PCO_2] and percentage of oxygen [PO_2], based upon several gradations of altitudes above sea level. At a specified gradation (e.g., 2999 feet above sea level or below), and PCO_2 level, a qualifying value must be less than or equivalent to the PO_2 listed in the table.

The record contains the following arterial blood gas test results:

Date of Test	Physician	PCO_2	PO_2	PCO_2 (post-exercise)	PO_2 (post-exercise)
06/25/2004	Baker	38	63	Not done	Not done[25]
11/30/2004	Broudy	39.2	63.1	No record	No record
03/09/2006	Dahhan	35.5	59.5	No record	No record
07/11/2006	Baker	35	65	Not done	Not done[26]

Dr. Baker administered tests at altitudes below 2999 feet; the altitudes at which the other tests were administered are not included in the record, but I presume those altitudes are 5999 feet or less.[27] For a PCO_2 value of 35, at an altitude of 2999 feet or less, the qualifying PO_2 value must be equal to or less than 65. For a PCO_2 value above 35 but less than 36, at an altitude of 2999 feet or less, the qualifying PO_2 value is 64; at an altitude of 3000-5999 feet, the qualifying PO_2 value is 59. For a PCO_2 value of 38, at an altitude of 2999 feet or less, the qualifying PO_2 value must be equal to or less than 62. With a PCO_2 value of 39.2, the qualifying PO_2 value is 61 at an altitude of 2999 or less and 56 at an altitude of 3000-5999 feet.

Based on the test results listed above, the Claimant attained a qualifying value in the test Dr. Baker administered in 2006, with a PO_2 value of 65, based on a PCO_2 value of 35, at an altitude below 2999 feet. In the test Dr. Dahhan administered, also in 2006, the Claimant measured a PO_2 value of 59.5, based on a PCO_2 value of 35.5. This result would be qualifying if the altitude is less than 2999 feet, but is not qualifying at an altitude of 3000 feet or more. In his deposition testimony, however, Dr. Dahhan stated that the Claimant attained a qualifying score

[25] The record states that the exercise portion of the study was medically contraindicated due to "degenerative joint disease" (DX 15 at 10). The regulation requires that an exercise blood gas test shall be offered unless medically contraindicated. §718.105(b). Under the circumstances described in the record, where the Claimant had medical conditions of a non-pulmonary nature that made exercise difficult, I find that an exercise blood gas test was contraindicated.

[26] The record states that the exercise portion of the study was medically contraindicated due to "degenerative joint disease" (CX 1).

[27] Per 29 C.F.R. §18.201, judicial notice may be taken of adjudicative facts. The highest point in Kentucky is 4145 feet. See: http://www.geology.com/states/Kentucky.shtml.

on the arterial blood gas test he administered. It appears, therefore, that Dr. Dahhan administered the test at an altitude below 2999 feet.

In light of the above, I find that the Claimant has established, based on arterial blood gas test results, that he is totally disabled.

Cor Pulmonale

A miner may demonstrate total disability with, in addition to pneumoconiosis, medical evidence of cor pulmonale with right-sided congestive heart failure. §718.204(b)(2)(iii). As stated above, I did not find that the Claimant had established the existence of pneumoconiosis. Moreover, there is no evidence of cor pulmonale with right-sided congestive heart failure. Accordingly, I find that the Claimant has not established total disability under this provision.

Physician Opinion

The final method of determining whether the Claimant is totally disabled is through the reasoned medical judgment of a physician that the Claimant's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work or comparable gainful employment. Such an opinion must be based on medically acceptable clinical and laboratory diagnostic techniques. §718.204(b)(2)(iv). A reasoned opinion is one that contains underlying documentation adequate to support the physician's conclusions. Fields v. Island Creek Coal Co., 10 BLR 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts and other data on which he bases his diagnosis. Id. An unreasoned or undocumented opinion may be given little or no weight. Clark v. Karst-Robbins Coal Co., 12 BLR 1-149, 1-155 (1989). A physician's opinion must demonstrate an adequate understanding of the exertional requirements of the Claimant's coal mine employment. Brigance v. Peabody Coal Co., B.R.B. No. 05-0722 B.L.A. (June 29, 2006)(en banc).

In his written report, Dr. Baker concluded that the Claimant had a moderate level of impairment, and noted a decreased FEV_1 level, decreased percentage of oxygen in the blood, chronic bronchitis, and coal workers' pneumoconiosis as the bases for his determination (DX 15). At his deposition, Dr. Baker testified that he was familiar with coal mine workers and their jobs. He stated that the Claimant should not work in a dusty environment, and he also stated that, even in a dust-free environment, the Claimant would have difficulty performing manual labor for eight hours a day on a sustained basis (CX 2 at 16-18). Dr. Baker did not specifically state that the Claimant was totally disabled.

Dr. Broudy did not give a specific opinion whether the Claimant was totally disabled, from a respiratory standpoint. He did note, however, that the values the Claimant obtained on the pulmonary function and arterial blood gas tests slightly exceeded the qualifying values for disability in black lung benefits cases (DX 19).

In his initial report, which indicated that the Claimant had worked as a jack setter underground, Dr. Dahhan concluded that the Claimant did not retain the respiratory capacity to continue his coal mine employment. However, Dr. Dahhan did not explain the basis for this

determination (EX 1). On cross-examination at his deposition, Dr. Dahhan testified that the pulmonary function and arterial blood gas tests that he administered showed that the Claimant's condition had worsened, and that in these recent tests the Claimant attained values establishing disability. The Claimant's FEV_1 value was qualifying, both before and after bronchodilator administration, and the other pulmonary function test values were also disabling. The Claimant's arterial blood gas test evidenced a qualifying value as well (EX 3 at 9-12).

Discussion

The only physician to give an opinion regarding whether the Claimant was able to continue to work as a miner was Dr. Dahhan. Dr. Dahhan concluded, based on the Claimant's pulmonary function and arterial blood gas test results, that the Claimant did not have the respiratory capacity to work as a miner. Dr. Dahhan's written report and deposition testimony reflect that Dr. Dahhan understood that the Claimant worked as an underground miner and was a jack settler. The record does not reflect that Dr. Dahhan had a detailed understanding of the exertional requirements of the Claimant's job. However, Dr. Dahhan stated that his conclusion was based on the Claimant's pulmonary function and arterial blood gas test results, which reflect total pulmonary disability, so Dr. Dahhan's understanding of the exertional requirements of the Claimant's job as a jack setter is not critically important.

I find that the Claimant has established that he is totally disabled from a pulmonary perspective, based on physician opinion. I also find that the Claimant has established, by a preponderance of the evidence, that he is totally disabled due to a respiratory or pulmonary condition. This constitutes a change in one of the conditions of entitlement since the final denial of the Claimant's previous claim, in 1988.

d. Whether the Claimant's Disability is Due to Pneumoconiosis

Lastly, the Claimant must establish that he is totally disabled due to pneumoconiosis. This element is fulfilled if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. §718.204(c); Grundy Mining Co. v. Flynn, 353 F.3d 467 (6th Cir. 2004); Lollar v. Alabama By-Products Corp., 893 F.2d 1258 (11th Cir. 1990). The regulations provide that pneumoconiosis is a "substantially contributing cause" of the miner's disability if it (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. In general, the fact that an individual suffers or suffered from a totally disabling respiratory or pulmonary impairment is not, in itself, sufficient to establish that the impairment is or was due to pneumoconiosis. §718.204(c)(2). A Claimant can establish this element through a physician's documented and reasoned medical report. §718.204(c).

As set forth above, I have found that the Claimant was unable to establish that he has pneumoconiosis. In this regard, I have considered whether the Claimant could establish that his obstructive pulmonary impairment arose from coal mine employment, as defined in §718.201, and I find that the Claimant could not. The sole physician who opined that the Claimant's obstructive respiratory impairment was related to his coal mine dust exposure, Dr. Baker, based

his conclusion on a presumption that the Claimant had 20 years of underground coal mine employment. I have found, however, that the Claimant's coal mine employment is approximately 10.55 years. Due to the disparity between the amount of coal mine employment Dr. Baker presumed and the amount I have found, I concluded that Dr. Baker's opinion is not well-reasoned, and I gave it little weight.

Consequently, I must find that the Claimant is unable to establish, by a preponderance of evidence, that his total disability is due to pneumoconiosis. This constitutes no change from the final denial of the Claimant's previous claim, in 1988.

G. Subsequent Claim

As set forth above, the Claimant has established that he has a total respiratory disability. This constitutes a change in this condition of entitlement since the final denial of his previous claim, in 1988. However, as set out in the discussion above, the Claimant has failed to establish, by a preponderance of evidence, the remaining elements of entitlement that were previously adjudicated against him. Therefore, his Claim must be denied.[28] §725.309(d). See Sharondale Corp. v. Ross, 42 F.3d 993 (6th Cir. 1994).

IV. CONCLUSION

Based upon applicable law and my review of all of the evidence, I find that the Claimant has not established his entitlement to benefits under the Act.

V. ATTORNEY'S FEE

The award of an attorney's fee is permitted only in cases in which a Claimant is represented by counsel and is found to be entitled to benefits under the Act. Because benefits were not awarded in this Claim, the Act prohibits the charging of any fee to the Claimant for representation services rendered in pursuit of the Claim.

VI. ORDER

The Claimant's Claim for benefits under the Act is DENIED.

A

Adele H. Odegard
Administrative Law Judge

Cherry Hill, New Jersey

[28] I note that the record of the Claimant's previous claim does not contain any medical opinion that the Claimant had an obstructive pulmonary impairment, let alone that any such impairment was related to his coal mine employment. See DX 2.

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. See 20 C.F.R. §§725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. See 20 C.F.R. §802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. See 20 C.F.R. §725.481.